APPENDIX A.

Order Appealed From.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 21, 1966.

Hon. Henry L. Ughetta,
Acting Presiding Justice.
Hon. Marcus G. Christ,
Hon. Arthur D. Brennan,
Hon. L. Barron Hill,
Hon. Samuel Rabin,
Associate Justices.

[SAME TITLE.]

In the above entitled cause, the above named Francis O. Case, *et al.*, defendants, having appealed to this court from a judgment of the Supreme Court, Kings County, entered in the office of its Clerk on June 16, 1960; this court by dated June 12, 1961 having reversed said judgment; respondents having moved (1) to vacate this court's order dated June 12, 1961 and the judgment entered thereon on June 23, 1961 and (2) to enter an order of affirmance;

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

Notice of Motion.

To be argued by
Robert L. Bobrick.

Oral argument requested.

NEW YORK SUPREME COURT,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

SIRS:

Please Take Notice that upon the annexed affidavit of Robert L. Bobrick, sworn to on September 2, 1966, the undersigned will move this Court at a Term thereof to be held at the Courthouse of the Appellate Division, Monroe Place, corner of Pierrepont Street, Brooklyn, New York, on September 19, 1966, at 9:30 A.M. or as soon thereafter as counsel can be heard, for an order vacating the order of reversal of this Court entered June 12, 1961, and the judgment entered thereon on June 23, 1961, and entering herein an order of affirmance of the judgment of the Supreme Court, Kings County, entered on June 16, 1960, and for such other and appropriate relief as may be just and proper in the premises.

The basis of the motion is that the order of reversal made by this Court is utterly void due to the disqualification of the then Acting Presiding Justice (now Presiding Justice) George J. Beldock.

Please Take Further Notice that answering papers, if any, are required to be served at least five (5) days before the return date of this motion.

Dated, New York, New York,
September 4, 1966.

Yours, etc.,

ROBERT L. BOBRICK
Attorney for Plaintiffs

To:

O'Brien, Driscoll and Raftery, Esqs.
Attorneys for Defendants-Appellants
Albert A. List, Royal B. Lord and
Dudley G. Layman

Dewey, Ballantine, Bushby, Palmer & Wood, Esqs.
Attorneys for Defendants-Appellants
Francis O. Case and Thomas Stokes

William F. Whitman, Esq.
Attorney for Defendant-Appellant
Glen Alden Corporation

Affidavit of Robert L. Bobrick, Read in Support of Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

ROBERT L. BOBRICK, being duly sworn, states:

1. I am the attorney for the plaintiffs (respondents). I make this affidavit in support of the motion to vacate the order of reversal made by this court which is dated June 12, 1961, which reversed the judgment of the Supreme Court, Kings County entered in the above action on June 16, 1960 against the defendants, Francis O. Case, Thomas Stokes, Albert A. List, Royal B. Lord and Dudley G. Layman.

Preliminary Statement

2. The ground upon which the motion rests is that the order of reversal is utterly void as the then Acting Presiding Justice George J. Beldock was peremptorily disqualified from sitting in on the appeal and from participating in its decision by reason of his interest in the case. Section 14 of the Judiciary Law disqualifies a judge to sit in or take any part in the decision of an action, claim, matter, motion or proceeding in which he is interested.

Prior Proceedings

3. Plaintiffs, shareholders of the corporate defendant, Glen Alden Corporation, sue derivatively to surcharge the other defendants for waste by reason of their conduct in promulgating an illegal reorganization plan. Actually,

on this motion, the facts of the case and the claims of the parties are not of much importance. Suffice it to say that after a trial, plaintiffs recovered a judgment against the defendants List, Lord, Layman, Case and Stokes (*Gilbert v. Burnside,* Misc. 2d , 197 N. Y. S. 2d 623).

4. The named defendants appealed to this Court. The appeals were heard on November 28, 1960 and were decided on June 12, 1961. The Bench consisted of Beldock, Acting P. J.; Christ and Pette, J. J., who voted for reversal, and Ughetta and Kleinfeld, J. J., who dissented and voted to affirm the judgment and order upon the opinion of the learned Justice at Special Term (13 A. D. 2d 982, 216 N. Y. S. 2d 430).

5. Although the determination of the Appellate Division on this appeal was void because of Mr. Justice Beldock's participation in it when disqualified by law, plaintiffs took an appeal from the three-to-two reversal to the Court of Appeals, which Court affirmed without opinion (11 N. Y. 2d 960, 229 N. Y. S. 2d 10). At the time plaintiffs were not aware of the void determination. This appeal to the Court of Appeals is no answer to the present application.

6. The Court of Appeals was induced to entertain, hear and decide this appeal as a result of a fraud upon that court, in that the facts which disqualified Mr. Justice Beldock from sitting or taking part in the appeal below were not called to the attention of the Court of Appeals either by counsel for the defendants or by Mr. Justice Beldock. The Court of Appeals was justified in relying and did rely on the strong presumption existing in every case before it that a Justice of the Appellate Division would not sit or take part in judgment in a cause in which he was disqualified from sitting or participating, and that, if disqualifying facts existed, the Justice affected thereby would voluntarily and of his own accord withdraw from the case.

7. Indisputably, the principal or key defendant is Albert A. List. He had absolute control of the corporate defendant. He, it was, who determined the operations and financial policies of the corporation with no practical risk of effective reversal of policy decisions; he, Albert A. List, selected the members of the Board of Directors, the technical repository of the decision-making function in the said corporation; he, Albert A. List, was the personification of management in control since the merger of the defendant, Glen Alden Corporation with List Industries, Inc. in 1959; he, Albert A. List, controlled the proxy machinery of the corporation to acquire majorities from the thousands of widely scattered small shareholders of Glen Alden Corporation; he, Albert A. List, controlled the corporate purse-strings; he had the power to appoint himself to any corporate office and directorship, to dispense corporate patronage, to turn over corporate business to individuals or organizations in which he was interested.

The Disqualification of Mr. Justice Beldock

8. At the time the appeal was heard in this court, there existed a close personal and a business relationship between Mr. Justice Beldock and the principal defendant, List. Mr. List had given to and Mr. Justice Beldock had accepted from Mr. List certain gifts for certain organizations in which Justice Beldock had an interest.

9. For instance—there is an organization which calls itself Brotherhood-In-Action. Justice Beldock is the founder. It was incorporated on July 22, 1960 under the Membership Corporation Law. Among its purposes it purportedly fosters equity and equal justice among men of all faiths; it is authorized to receive gifts. Mr.

Justice Beldock was one of the incorporators. At the time of the argument of the appeal Mr. Justice Beldock was president of Brotherhood-In-Action, Inc.

10. Before me is a brochure of Brotherhood-In-Action, Inc., 560 7th Avenue (at 40th Street), New York. On the unnumbered seventh page the officers and committees are stated. Under the heading "Founder and Honorary President" is the name of "Hon. George J. Beldock". Under the heading "Chairman of the Board of Directors" is the name of Albert A. List.

11. The building at 560 7th Avenue, New York, is known as "Brotherhood House" and was designed by the architect, William Lescaze; it is six stories high, includes a 400 seat auditorium, library, conference rooms, a radio-television studio and offices. The cost is reported to be $3,000,000. It was met by contributions from individuals and foundations. Among the individuals and foundations who contributed was the defendant Albert A. List. There is the Albert A. List Foundation, Inc. (of which Albert A. List and members of his family are a majority of the trustees); and there is Alberlist Corporation (most of the stock of which is owned by Albert A. List, members of his family and trusts for their benefit). Gifts given by Mr. List before and after the appeal, directly and indirectly, were substantial.

12. When the information and facts came to my attention, I wrote Mr. Justice Beldock on April 12, 1965. My letter was as follows:

"Hon. George J. Beldock
Presiding Justice
Appellate Division
Second Judicial Department
45 Monroe Place
Brooklyn, New York

Dear Sir:

In 1961 an appeal in the case of *Gilbert and others, stockholders of Glen Alden Corporation, etc. v. Burnside and others, List Industries, Inc. and Glen Alden Corporation* was argued before you as Acting Presiding Justice. The key or principal defendant-appellant was Mr. Albert A. List.

The appeal was from the judgment of the Supreme Court, Kings County, entered June 16, 1960. On or about June 12, 1961, your Court made an order reversing the judgment, with costs, and dismissed the complaint, etc. The Court was divided: Beldock, Acting P. J., Christ and Pette, JJ., concur; Ughetta and Kleinfeld, JJ. dissent and vote to affirm the judgment and order upon the opinion of the learned justice at Special Term (*Gilbert v. Burnside,* Misc. 2d , 197 N. Y. S. 2d 623).

The nub of the majority opinion was that appellants had relied upon advice of counsel, and that was a good defense.

On April 7, 1965, Mrs. Bobrick attended a conference of the New York City Chapter, National Association of Social Workers held at the Brotherhood in Action building. She brought home a brochure of the Brotherhood. In reading it, I noted that you are the Founder and Honorary President, and Mr. Albert A. List is Chairman of the Board of Directors!

I want to know why your obligations and relationships with Mr. List were not disclosed to me, as the attorney for the respondents, at the time the appeal was argued, and why you did not disqualify yourself in hearing and deciding the appeal?

I am writing because I believe that I am entitled to the information.

Respectfully yours,

ROBERT L. BOBRICK"

13. There was no reply. However, on April 19, 1965, at approximately 1:25 P. M., a man, who did not identify himself, telephoned me saying he had a message from Judge Beldock—that though Judge Beldock generally replies to letters he would not do so in this instance—that I can act accordingly.

14. There is no gainsaying that the interest of Justice Beldock in the case before him was as real as life.

The Authorities

15. A memorandum setting forth the statutes and authorities is being submitted in support of this application.

16. Under the law Justice Beldock was peremptorily disqualified in hearing and participating in the case.

17. From early times (and it is true today), it was held that

> "Courts should scrupulously maintain unsullied their dignity and integrity. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence aliunde the record * * * In the administration of justice it is not only requisite that a judge be honest, unbiased, impartial and disinterested in fact, but equally essential that all doubt or suspicion to the contrary should be jealously guarded against and eliminated. Not only is it the duty of a judge to render a righteous judgment but it is of transcendent im-

portance to the litigants and the public generally that there should not be the slightest suspicion as to the fairness and integrity. Caesar demanded that his wife should not only be virtuous but beyond suspicion. The people should not exact less from the judiciary, the most powerful branch of our government."

18. In Deuteronomy the judge is commanded: "* * * thou shall not respect persons, neither take a gift: for a gift doth blind the eyes of the wise, and pervert the words of the righteous" (Ch 16:19).

19. I submit that to allow the order of reversal of this Court to stand is to degrade the judicial process, to undermine the administration of justice and to strike a serious blow to our liberties.

20. Should there be any hesitancy or doubt whether plaintiffs are entitled to the relief they seek, it is requested that a full and open hearing be ordered.

21. All of the foregoing is respectfully submitted.

(Sworn to by Robert L. Bobrick, September 2, 1966.)

Notice of Submission of Affidavits in Opposition.

To be argued by
George A. Raftery

NEW YORK SUPREME COURT,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

SIRS:

Please Take Notice, that the Defendants-Appellants, Francis O. Case, Dudley G. Layman, Albert A. List, Royal B. Lord, and Glen Alden Corporation, submit herewith the attached affidavits of Arthur F. Driscoll, sworn to September 8, 1966, John E. F. Wood, sworn to October 7, 1966, William D. Friedmann, sworn to September 12, 1966, William F. Whitman, sworn to September 19, 1966, and Albert A. List, sworn to October , 1966, in opposition to a Motion made by Robert L. Bobrick, attorney for the plaintiffs, for an Order vacating the Order of Reversal of this Court, entered on June 12, 1961 and the Judgment entered thereon on June 23, 1961.

Yours,

O'BRIEN, DRISCOLL & RAFTERY
Attorneys for Defendants-Appellants
Francis O. Case, Dudley G. Layman,
Albert A. List, Royal B. Lord, and
Glen Alden Corporation

To:

Robert L. Bobrick
Attorney for Plaintiffs

Battle, Fowler, Stokes & Kheel
Attorneys for Defendant-Appellant
Thomas Stokes

Affidavit of Arthur F. Driscoll, Read in Opposition to Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

ARTHUR F. DRISCOLL, being duly sworn, says: I have been a member of the Bar of the State of New York since 1910.

The firm of O'Brien, Driscoll & Raftery, of which I am senior member, during the period of the pendency of the above-entitled litigation were attorneys for Albert A. List, Royal B. Lord and Dudley G. Layman.

Upon the hearing of the appeal therein held before the Appellate Division, Second Department on the 10th day of November, 1960, I personally argued the said appeal on behalf of the appellants represented by my firm. Upon said hearing I was the first to argue. Justice George J. Beldock was acting presiding justice in the absence of presiding Justice Nolan. As I stood at the lectern, but before I had started my argument, Justice Beldock stated that he wanted to inform all parties that he was interested in a charitable organization and that Mr. List, one of the defendants in the court below and an appellant on the appeal, was also interested in the same organization. He stated very definitely that he wished to make this fact known in order that any party to the litigation might have the opportunity to object to his sitting on the appeal, and he indicated very clearly and my recollection is that he stated in so many words that if any party to the litigation believed that his identification with that organiza-

tion would in any way influence his decision in this matter, he would withdraw from the case.

There was then present in court a number of counsel. Robert L. Bobrick was personally present. Deponent was accompanied by William D. Friedmann, an associate of deponent's in the office of O'Brien, Driscoll & Raftery, and an assistant to the deponent on this particular matter. Mr. John Woods of the firm of Dewey, Ballantine, Bushby, Palmer and Wood, was in court representing Francis O. Case and Thomas Stokes, parties to the litigation. William F. Whitman, as attorney for Glen Alden Corporation, was present in the court. All of these parties affirmatively indicated that they had no objection whatever to Justice Beldock's participation in the decision of this appeal. The appeal was argued in full by the Appellate Division and the judgment of the trial court was reversed by a divided court, as shown in Mr. Bobrick's papers. Thereafter Mr. Bobrick, representing the plaintiffs, took an appeal to the Court of Appeals and that Court unanimously affirmed the decision of the Appellate Division. It was after the decision of the Court of Appeals that I first heard of any contention on the part of Mr. Bobrick that Justice Beldock should have withdrawn from the case.

(Sworn to by Arthur F. Driscoll, Sept. 8, 1966.)

Affidavit of John E. F. Wood, Read in Opposition to Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

JOHN E. F. WOOD, being duly sworn, deposes and says as follows:

1. I am a member of the firm of Dewey, Ballantine, Bushby, Palmer & Wood and have been a member of the bar of the State of New York since 1935.

2. My firm represented Francis O. Case and Thomas Stokes in the above-entitled litigation and I personally participated in the trial thereof and in the argument of the successive appeals to the Appellate Division, Second Department and to the Court of Appeals.

3. It is my recollection that at the beginning of the argument before the Appellate Division, Second Department on November 10, 1960 Justice Beldock stated that he had had some connection with one or more charitable organizations with which Albert A. List was also connected. It is further my recollection that each of the counsel then present (including counsel for the respondents) stated in effect that this fact should not stand in the way of Justice Beldock's participation in the consideration and decision of the case.

(Sworn to by John E. F. Wood, October 7, 1966.)

Affidavit of William D. Friedmann, Read in Opposition to Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

WILLIAM D. FRIEDMANN, being duly sworn, deposes and says:

I have been a member of the Bar of the State of New York since 1952.

I have been associated with the firm of O'Brien, Driscoll & Raftery since 1952 and associated with Arthur F. Driscoll, senior member of said firm, during the pendency of the above-entitled litigation as counsel for Albert A. List, Royal B. Lord and Dudley G. Layman.

Upon the hearing of the appeal therein held before the Appellate Division, Second Department, on the 10th day of November, 1960, I was personally present as assistant to Mr. Driscoll, who argued the said appeal on behalf of the appellants represented by our firm.

My recollection as to the events that transpired that day seems quite clear. Mr. Driscoll was the first attorney to argue. Before he commenced his argument, Mr. Justice George J. Beldock, who was acting presiding justice in the absence of presiding Justice Nolan, informed all present that he was interested in a charitable and/or philanthropic organization, and that Mr. List, one of the defendants in the court below and an appellant on the appeal represented by our firm, was also interested in the same organization. Mr. Justice Beldock then

inquired whether any interested party, including counsel involved in the litigation, believed that his identification with that organization would impair his ability to hear the appeal and if there was any such feeling, he would withdraw from the bench hearing the appeal. Further, my recollection seems equally clear that all counsel present, including Robert L. Bobrick, attorney for plaintiffs-respondents, affirmatively indicated that they had no objection whatsoever to Mr. Justice Beldock's participation with respect to the appeal. My specific recollection is that Mr. Bobrick orally addressed the bench and expressed satisfaction and confidence in Mr. Justice Beldock's ability to continue and hear and decide the appeal.

I have read the affidavit of Mr. Driscoll, sworn to the 8th day of September, 1966, and I fully concur with all other matters stated therein which I have not covered herein.

(Sworn to by William D. Friedmann, Sept. 12, 1966.)

Affidavit of William F. Whitman, Read in Opposition to Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

WILLIAM F. WHITMAN, being duly sworn, deposes and says:

I have been a member of the Bar of the State of New York since December, 1930. I was the attorney for the Glen Alden Corporation, one of the Defendants-Appellants during the pendency of the above-entitled litigation.

Upon the hearing of the appeal therein before the Appellate Division, Second Department, on the 10th day of November, 1960 I was personally present as attorney for the Defendant-Appellant, Glen Alden Corporation. Upon said hearing, Arthur F. Driscoll of the firm of O'Brien, Driscoll & Raftery, attorneys for Defendants-Appellants Albert A. List, Royal B. Lord and Dudley G. Layman, was the first to argue. Before he commenced his argument, Mr. Justice George J. Beldock, who was acting as presiding Justice, informed all present that he was interested in a charitable organization and that Albert A. List, one of the Defendants-Appellants, was interested in the same charitable organization. He stated very definitely that he wished to make this fact known in order that any party to the litigation might have the opportunity to object to him hearing the appeal, and indicated that if any party to the litigation believed that if his identification with that organiza-

tion would in any way influence his decision in the matter, he would withdraw from the case.

There were present in Court the following counsel: Robert L. Bobrick, the Petitioner herein, William D. Friedmann, Esq., associate counsel to Mr. Driscoll, John Wood, Esq., of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, counsel who represented Francis O. Case and Thomas Stokes, Defendants-Appellants and your deponent as attorneys for Glen Alden Corporation.

All of these parties affirmatively indicated that they had no objections whatever to Justice Beldock's participation in the decision of this appeal. The appeal was argued in full before this Court, which reversed the judgment of the trial court. Thereafter, your Petitioner herein, representing plaintiffs-respondents, took an appeal to the Court of Appeals, which unanimously affirmed the decision of this Court.

It was after the decision of the Court of Appeals that I first heard of any contention on the part of the Petitioner that Justice Beldock should have withdrawn from the case.

(Sworn to by William F. Whitman, September 19, 1966.)

Affidavit of Albert A. List, Read in Opposition to Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

ALBERT A. LIST, being duly sworn, deposes and says:

I was one of the defendants in the above-entitled action and was represented by the firm of O'Brien, Driscoll & Raftery. My defense was conducted by Arthur F. Driscoll, Esq., senior partner of the firm of O'Brien, Driscoll & Raftery.

I have read the affidavit of Robert L. Bobrick in support of a motion to vacate an Order of Reversal of this Court.

There never has existed a close, personal and business relationship between Mr. Justice Beldock and myself. I never at any time attempted to influence the decision of the Honorable Justice George J. Beldock in this case, and any intimation in the affidavit of Robert L. Bobrick that this was done is false and untrue.

I have made the following donations to Brotherhood-in-Action: In the year 1960 I donated $19,125.00 and the Albert A. List Foundation donated $500.00. In the year 1963 the Albert A. List Foundation donated $10,000.00; in 1964, $26,000.00; in 1965, $29,000.00; and in 1966, $1,000.00. From 1960 down to date, I personally, as

indicated, donated $19,125.00 and the Albert A. List Foundation donated $66,500.00 to this charitable organization. During the same period, I contributed far more substantially to other charitable organizations, all of which is a matter of record.

I have served as a Director of Brotherhood-in-Action, Inc. and have been Chairman of the Board of Directors since November 12, 1962.

I believe the defendant had a good and meritorious defense in this action, which is borne out by the decision of the Court of Appeals, when it unanimously affirmed the decision of this Court.

I retired as Chairman of the Board of Glen Alden Corporation on September 20, 1965, and since that date have devoted myself to the management of the many personal investments and real estate interests and to the many philanthropic activities that I am engaged in.

(Sworn to by Albert A. List, October 19, 1966.)

Reply Affidavit of Robert L. Bobrick, Read in Support of Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

ROBERT L. BOBRICK, being duly sworn, deposes and says:

1. The opposing papers rely on the claim that Mr. Justice Beldock stated at the start of the argument that he and Mr. List were interested in the same charitable organization, and offered to withdraw. The difficulty with that casual statement is that it was not meaningful and was too vague to enable counsel for the plaintiffs-respondents (your deponent) to form a judgment as to Mr. Justice Beldock's interest or his involvement with Mr. List. All of us, it may safely be assumed, are interested in some charitable organizations. For example, that a judge contributes to or is interested in the American Red Cross or Y. M. C. A. or Y. M. H. A. would not disqualify him just because a litigant before him is likewise interested in or contributes to these organizations. What Mr. Justice Beldock did not disclose is that the organization was one he had founded, that he was its president, that it was recently incorporated (July 22, 1960), that gifts were being solicited, that a $3,000,000 building was to be constructed, that he had received for his organization shortly before the appeal was heard $19,625 from Mr. List in marketable stocks or cash or both, that he, Mr. Justice Beldock knew that Mr. List

could be counted on for more contributions (he has since given through his controlled foundation $66,500—see, affidavit of Mr. List).

2. Neither Mr. Justice Beldock nor an officer of the foundation has submitted an affidavit from which we could learn further facts.

3. On the other hand, whether or not Mr. Justice Beldock made a "disclosure," he should have disqualified himself without question or inquiry, as he, himself, knew the fact which peremptorily disqualified him from sitting and participating on the appeal. *This is a disqualification that cannot be waived.*

4. The thrust of the opposition is at the word "interest" in the statute. Any interest, large or small, disqualifies a judge if his complete impartiality is or would tend to be affected, for the prohibition of the statute is absolute and deprives the judge or court of jurisdiction. And where no jurisdiction exists by law it cannot be conferred by consent, it cannot be waived—especially against the prohibitions of a law, which was not designed merely for the protection of a party to a suit, but for the general interests of justice. The receipt of gifts and favors from Mr. List before the argument of the appeal, the known expectation of further gifts and favors constituted in any sense a real, tangible, visible interest. Mr. Justice Beldock's disqualification is unassailable.

As was said by the Court of Appeals (p. 551):

> "The provisions of our revised statutes on this subject profess to be merely declaratory of universal principles of law, which makes no distinction between the case of interest and that of relationship, both operating equally to disqualify a judge."
> (*Oakley v. Aspinwall*, 3 N. Y. 547)

5. The lack or failure of jurisdiction has no time limit and may be raised at any time. (*M. of Caffrey,* 52 App. Div. 268; *Davis v. Seaward,* 85 Misc. 210). A claim of laches is out of place.

6. The defendants argue that plaintiffs cannot claim that they were prejudiced by the presence of Mr. Justice Beldock as a member of the Appellate Division which heard and decided the appeal because of the affirmance by the Court of Appeals.

As we said by the Court in another instance:

> "The Court of Appeals was induced to entertain, hear and decide this appeal by a species of fraud upon that Court in that the facts which disqualified Mr. Justice Burr from sitting below were not called to the attention of the Court of Appeals either by Mr. Wilson in his brief or by Mr. Justice Burr in his opinion. The Court of Appeals was justified in relying and did rely on the strong presumption existing in every case coming before it that a justice of the Appellate Division would not sit in judgment in a cause in which he was disqualified from sitting and that, if disqualifying facts existed, the justice affected thereby would voluntarily and of his own accord withdraw from the case."
> (*Seaward v. Tasker,* 143 N. Y. S. 264, 267.)

7. Plaintiffs raise here the constitutional question whether a trial, decision or a determination of a judge who is disqualified from participation in the consideration and decision of the case, and who is thereby not impartial or of doubtful partiality, deprives a litigant of property and rights without due process of law under the Fourteenth Amendment of the United States Constitution which prohibits any State to deprive any person of life, liberty, or property, without due process of law, or to

deny to any person within its jurisdiction the equal protection of the laws (Sec. 1). The right to an impartial determination by a Court is guaranteed by the Constitution. As a Court said: "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation." (*People v. Kohl,* 17 Misc. 2d 320, 1959).

8. It is evident that the whole truth is not before the Court on this application. The situation calls for a full and complete hearing of Mr. Justice Beldock's participation, directly or indirectly, in the affairs of Brotherhood-In-Action, including the planning and construction of the $3,000,000 building and all subsequent expenditures of said organization. This matter has branches, and the branches twigs.

Conclusion.

9(a) The motion should be granted vacating the order of reversal of June 12, 1961, the judgment entered thereon on June 23, 1961, and reinstating the judgment of the Court below. At this time a full hearing should be ordered to take evidence.

(Sworn to by Robert L. Bobrick, November 10, 1966.)

APPENDIX B.

Order on Motion to Appeal to the Court of Appeals.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 19, 1967.

Hon. George J. Beldock,
Presiding Justice.
Hon. Marcus G. Christ,
Hon. Arthur D. Breman,
Hon. Samuel Rabin,
Associate Justices.

SAMUEL GILBERT, *et al.*,

Respondents,

v.

FRANK BURNSIDE, *et al.*,

Defendants,

and

FRANCIS O. CASE, *et al.*,

Appellants.

In the above entitled cause, the above named Samuel Gilbert, *et al.*, respondents, having moved for leave to appeal to the Court of Appeals;

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

Notice for Leave to Appeal.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

SIRS:

Please Take Notice, that upon the annexed affidavit of Robert L. Bobrick, sworn to the 19th day of July, 1967, the order of this court entered the 21st day of November, 1966, the papers upon which said order was based, the order of this court entered June 12, 1961, the record on appeal to this court and the briefs filed therein and upon all the papers and proceedings had herein, the undersigned will move this court at a Term thereof to be held at the courthouse of the Appellate Division, Monroe Place, corner Pierrepont Street, Brooklyn, New York, on the 6th day of September, 1967, at the opening of Court that day, or as soon thereafter as counsel can be heard for an order granting plaintiffs leave to appeal pursuant to CPLR §5602 (b)(1) to the Court of Appeals upon certified questions stated in the annexed affidavit from the order entered in the office of the Clerk of the Appellate Division, Second Judicial Department on the 21st day of November, 1966, which order denied the motion of the plaintiffs (1) to vacate the order dated June 12, 1961 of said Appellate Division (*inter alia* reversing a judgment in their favor—see 13 A. D. 2d 982, affirmed 11 N. Y. 2d 960) and the judg-

ment entered thereon on June 23, 1961 and (2) to enter an order of affirmance, and for such other and appropriate relief as may be just and proper in the premises.

Dated: New York, N. Y., July 19, 1967.

Yours, etc.,

ROBERT L. BOBRICK
Attorney for Plaintiffs
Office and P. O. Address:
345 Eighth Avenue
New York, N. Y. 10001
Tel. (212) 242-2282

To:

O'Brien, Driscoll and Raftery, Esqs.
152 West 42nd Street
New York, N. Y. 10036
Attorneys for Francis O. Case, Dudley G. Layman, Albert A. List, Royal B. Lord and Glen Alden Corporation, Defendants

Affidavit of Robert L. Bobrick.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

[SAME TITLE.]

State of New York,
County of New York, ss:

ROBERT L. BOBRICK, being duly sworn, deposes and says as follows:

1. I am the attorney for the plaintiffs, who were respondents in this Court.

2. Defendants, Francis O. Case, *et al.*, appealed to this Court from a judgment of the Supreme Court, Kings County, entered in the office of its Clerk on June 16, 1960. This Court by order dated June 12, 1961 reversed said judgment. Plaintiffs moved to vacate the order of reversal, and for other relief. The basis for the motion was that the order of reversal was and is utterly void by reason of the disqualification of Mr. Justice George J. Beldock, then Acting Presiding Justice, now the Presiding Justice. The Court by its order entered on November 21, 1966, denied the motion to nullify its order of reversal.

3. Plaintiffs appealed on constitutional grounds from the order entered November 21, 1966, to the Court of Appeals. This was done on the supposition that in a proceeding originating in the Appellate Division there can be no reversal or modification, and an appeal would lie as of right in such a situation on the basis of a constitutional question. (See: *Valz v. Sheepshead Bay Bungalow Corp.*, 249 N. Y. 122; *DeVeau v. Braisted*, 5 N. Y. 2d 236, aff'd 363 U. S. 144.)

4. Argument was heard by the Court of Appeals on April 17, 1967. On May 23, 1967, the Court of Appeals dismissed the appeal, without opinion, upon the ground that the order appealed from does not finally determine the proceedings within the meaning of the Constitution. (All concurred, except Fuld, Ch. J., and Keating, J., taking no part.)

5. Plaintiffs then moved in the Court of Appeals for leave to appeal. Their motion was dismissed on July 7, 1967 upon the ground that the order sought to be appealed from is not final within the meaning of the Constitution.

6. The only recourse open to plaintiffs now is to obtain leave to appeal to the Court of Appeals from this Court.

7. Accordingly, plaintiffs move pursuant to Article VI, Section 3, subdivision (4) of the Constitution of the State of New York, supplemented by CPLR 5602(B)(1) for leave to appeal to the Court of Appeals upon certified questions, from the order of this Court entered November 21, 1966, inasmuch as the appeal involves questions of law which ought to be reviewed by the Court of Appeals.

8. It is submitted that the following questions of law ought to be certified to the Court of Appeals for answer in conformity with CPLR §5713:

Question One: Is the admitted conduct of Presiding Justice Beldock with respect to defendant, Albert A. List, within the prohibition of Canon 25 of the Canons of Judicial Ethics of the American Bar Association requiring that "a Judge * * * should not solicit for charities"?

Question Two: Does the word "interest" as used in the Judiciary Law, Section 14, include the conduct prohibited by Canon 25 of the Canons of Judicial Ethics?

Question Three: Did the admitted conduct of Presiding Justice Beldock automatically disqualify him?

Question Four: Was Mr. Justice Beldock's disqualification so absolute that it could not be waived?

Question Five: Was the order of reversal of the Appellate Division of June 12, 1961 entered in violation of "equal protection" and of "due process of law" under the Fourteenth Amendment to the Constitution of the United States as well as the Constitution of the State of New York?

Question Six: Is the order of the Appellate Division, Second Judicial Department of June 12, 1961 null and void?

WHEREFORE, plaintiffs pray for leave to appeal to the Court of Appeals upon certified questions of law, as herein specified.

ROBERT L. BOBRICK

Sworn to before me this
19th day of July, 1967.
WILLIAM F. JACKEL,
Notary Public, State of New York.
No. 30-7050750.
Qualified in Nassau County.
Commission Expires March 30, 1968.

Decision of New York Court of Appeals.

GILBERT, ap. v. BURNSIDE, def. (Case, res)—Appeal dismissed without costs, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution (*Matter of Gladstone,* 19 N. Y. 2d 603).

No opinion. All concur, except Fuld, Ch. J., and Keating, J., taking no part.

Decision of the Court of Appeals on Motion for Leave to Appeal to the Court of Appeals.

MOTION for leave to appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 21, 1966, which denied a motion by plaintiffs (1) to vacate an order of said court, entered June 12, 1961, (a) reversing, on the law and the facts, so much of a judgment of the Supreme Court, entered in Kings County upon a decision of the court on a trial at Special Term (A. DAVID BENJAMIN, J.), as directed that plaintiffs recover a specified sum from individual defendants-respondents and (b) dismissing the complaint, (2) to vacate the judgment, entered June 23, 1961 upon said order of June 12, 1961 (see 13 A. D. 2d 982, affd. 11 N. Y. 2d 960), and (3) to enter an order affirming said judgment of Special Term.

Motion dismissed upon the ground that the order sought to be appealed from is not final within the meaning of the Constitution.